UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT.

No. 15,887.
Civil Action.

CLINTON FOODS, INC., a Delaware Corporation,
Appellant,

vs.

MARVIN YOUNGS,
Appellee.

Appeal from the United States District Court for the Southern District of Iowa.

APPELLANT'S BRIEF.

STATEMENT OF THE CASE.

The Plaintiff-Appellee, Marvin A. Youngs, brought suit against the Defendant-Appellant, Clinton Foods, Inc., to recover damages for injuries suffered by coming in contact with a high tension wire while working on defendant's property at Clinton, Iowa.

The complaint alleged that Clinton Foods, Inc., had contracted with plaintiff's employer, Pittsburgh Piping & Equipment Company, to install a turbine on its property and the piping necessary to effectively operate the tur-

bine and had retained supervisory control of the execution of the project and full control of the surrounding premises adjacent to and remote from the site of the performance of the work. The complaint further alleged that the defendant was negligent in one or more of the following respects:

1. In preparing and causing, incident to the execution of the general project, the laying of a watermain in and through the enclosure of a bank of transformers carrying high voltage electricity without providing the adequate safeguards to prevent plaintiff from coming in contact with the wire leading to said transformers.

2. In causing said work to be executed in such close proximity to said transformers without causing the current in the wire leading to said transformers to be shut off during the performance of said work.

3. In failing to warn plaintiff of the fact that said lead-in-wire was live.

4. In failing to cause the wires to which plaintiff was exposed, if live, to be properly and adequately insulated.

5. In preparing plans for and causing the execution of a project under conditions of obvious hazard, subjecting this plaintiff to a continuously imminent danger of electrocution without providing adequate safeguards.

and that plaintiff was free of contributory negligence and the negligence of defendant was the sole proximate cause of his injuries and ensuing damage.

So far as material to this appeal, the defenses raised in the answer filed by Clinton Foods, Inc., consisted of an allegation that the work was being performed under the supervision and control of Pittsburgh Piping & Equipment

Company, a general denial of the allegations of negligence, an allegation that plaintiff was guilty of contributory negligence in the premises, and an allegation that plaintiff assumed the risk in the premises.

In the interest of convenience, the Appellant, Clinton Foods, Inc., will sometimes be referred to as the defendant and sometimes as Clinton; the Appellee, Mr. Youngs, will customarily be referred to as plaintiff; and plaintiff's employer, Pittsburgh Piping & Equipment Company, will be referred to as Pittsburgh.

During the trial of the case, it was stipulated that, as to the defendant, plaintiff's employer, Pittsburgh, occupied the status of an independent contractor (Record, p. 33), and that Pittsburgh would provide all labor, materials, tools, supervision and methods as outlined in the specifications as well as all equipment and transportation necessary for proper execution of the work (Record, pp. 33 and 34).

The evidence was devoted primarily to the question of whether the plaintiff was warned of the danger involved in working in the area and whether he was aware of the danger from any other source.

There was disagreement as to the legal duty of the defendant, plaintiff contending that it was defendant's duty to provide a safe place to work and to avoid any condition which might imperil his safety, and predicating his case primarily upon the failure of the defendant to turn off the electricity in the area while the work was going on. Defendant contended that its duty was to warn plaintiff, and that it was not obliged to furnish a safe place to work or to turn off the electricity. It is also contended that the proximate cause of the accident was Pittsburgh's negligence in carrying on its work in proximity to an area of known danger, without requesting a temporary shut down in power, and in refusing defendant's offer of barricades or rubber blankets to protect its employees. The court ap-

parently adopted the theory of the plaintiff and instructed the jury in accordance therewith. The jury returned a verdict in favor of the plaintiff in the amount of $80,000.00.

Installation of the turbine required that a 20-inch cast iron pipeline be laid underground to run to the turbine. The plans which were procured by the defendant called for running the pipeline through an enclosed area which contained defendant's power plant, including two sets of transformers. One bank of transformers was the usual power source and the other bank was the emergency or stand-by power source.

A ditch was dug through the enclosed transformer area. It had been excavated by a crew of laborers employed by Pittsburgh (Record, p. 19). The ditch passed by the bank of emergency transformers at one point and the center of the ditch was 7 feet 3 inches from the concrete base supporting the transformers. According to Edward G. Morgan, foreman of the crew of pipefitters employed by Pittsburgh, the ditch was about 36 inches wide (Record, p. 19). Another employee, Norman T. Owen, testified that it was "approximately between 4 and 5 feet in width". (Record, p. 23). The concrete base upon which the transformers sat was approximately three feet above the ground level (Record, p. 7). Dirt which had been excavated from the ditch was thrown up alongside this concrete base. According to Cecil W. Shannon, defendant's mechanical engineer, the dirt was piled up to the top of the base (Record, p. 14), while the foreman, Mr. Morgan, testified that it had been piled up to within 14 inches of the top of the base (Record, p. 16). The transformer which was nearest to the ditch had a lead-in wire which was about a foot further from the edge of the ditch than was the edge of the concrete base (Record, pp. 13 and 14). The record is silent as to its height above ground level but it may be observed in Plaintiff's Exhibit 3 (Record, p. 67). It was this wire which plaintiff contacted and which caused the injuries.

During the course of plaintiff's work on the job, the emergency transformers were constantly energized (Record, p. 9). It was the custom of the defendant to keep them in service at all times except when work had to be done on them (Record, p. 14) because its operations were such that, for the safety of its own employees, their being in position to cut in automatically, upon a failure of the regular facilities, was imperative.

Plaintiff was a member of a crew of pipefitters numbering five men, including the foreman. At the time of the injury to plaintiff, this crew was engaged in swinging a length of pipe into the ditch at a point opposite the emergency transformers, and a chain-fall was being utilized in this work (Record, p. 16). The chain-fall had been connected around a plank which crossed the ditch, with one end resting upon a pile of dirt and the other end resting upon the concrete base (Record, p. 16). Plaintiff had been standing on the plank and apparently, immediately before the accident, had started to leave the plank to go to the ladder next to the pump house and descend to the ditch (Record, p. 17). As he did so, he contacted the lead-in wire with his hand (Record, p. 18), and he fell with his head or neck resting against the angle iron on the corner of the transformer bank (Record, p. 17).

The evidence disclosed the existence of several warning signs in the area which indicated danger and a voltage of 13,200 volts. There was considerable evidence of oral warnings issued to the foreman and the members of the crew which will be dealt with more fully and more explicitly in the argument.

Plaintiff had been at work, as an employee of Pittsburgh, for about five or six weeks on defendant's property (Record, p. 27) and had spent a total of about five days, not consecutively, in the ditch area and two or three days in the ditch (Record, p. 28).

Defendant moved for a directed verdict at the close of plaintiff's evidence (Record, pp. 34 and 35) and renewed its Motion for Directed Verdict at the close of all of the evidence (Record, pp. 39 and 40). After the return of the verdict and the judgment entered thereon, defendant filed a Motion for Judgment Notwithstanding the Verdict (Record, pp. 52 and 54). Defendant's Motion for Directed Verdict urged at the close of plaintiff's evidence was denied (Record, p. 35), defendant's Motion for Directed Verdict at the close of all the evidence was denied (Record, p. 41) and its Motion for Judgment Notwithstanding the Verdict was denied and overruled (Record, pp. 55 and 56). From the judgment entered, the defendant appeals on the basis of these rulings.

The defendant does not attack the size of the verdict rendered nor does it rely upon error other than error in overruling the three motions hereinbefore referred to. The appeal is based purely upon the question of liability and defendant contends that there was insufficient evidence to take the case to the jury.

FOREWORD.

In connection with the trial below, and particularly during proceedings on the Motion for Judgment Notwithstanding the Verdict, it became apparent to us that counsel for the plaintiff were laboring under what we believe to be a misapprehension as to the applicability of certain Iowa cases, based on an Iowa statute raising an inference or presumption of negligence on the part of those maintaining lines for the transmission of electricity, and that they succeeded in persuading the trial court to adopt their theory of the case. One of the plaintiff's positions was that, because electrical transmission facilities owned by the defendant were involved, the defendant owed a duty to make the premises safe for the employees of an inde-

pendent contractor notwithstanding the fact that the latter was solely responsible for the method, progress and details of the work, and even though the hazards involved were fully known.

Plaintiff's conception of reasonable care in a case involving electricity differed greatly from defendant's view. In support of his theory, plaintiff quoted at length from a large number of cases involving electricity in one way or another.

Defendant feels that it can and, in connection with its Motion for Judgment Notwithstanding the Verdict did, distinguish these cases from the one here involved. Either they related to public utilities, were decided under the laws of states having an entirely different concept, or the quotations were out of context. The result was, in essence, two utterly conflicting, affirmative theories. This necessitated an extensive review and discussion of each of the cases cited, which covered forty-four typewritten pages and a review of the legislative history of the statute, requiring eleven pages.

Defendant cannot anticipate whether plaintiff's theory will be presented in the same way, nor can it anticipate what cases, or how many, plaintiff will rely on in his brief, so this brief will be confined to an attempt to set out and develop defendant's contentions as to the Iowa law and its application to this matter.

We have made this explanation because we fear that we will be unable to adequately reply to plaintiff's brief in the fifteen pages allotted us by Rule 11 of the Rules of this Court, and we wish to call attention to the fact that we may find it necessary to apply for permission to file a somewhat longer reply brief than the Rule contemplates.

POINTS TO BE ARGUED AND AUTHORITIES.

I.

The duty of the defendant to use due care for the safety of plaintiff requires only that it do nothing to render its premises unsafe and that it warn plaintiff of any dangers known to it but unknown to him.

Gowing v. Henry Field Co., 225 Iowa 729, 281 N. W. 281;

American District Telegraph Co. v. Kittelson, 179 Fed. (2d) 946 (8 Cir., Iowa);

Deaton v. Board of Trustees of Elon College, 226 N. C. 433, 38 S. E. 2d 561;

44 A. L. R. 982 (Annot.).

II.

The defendant was not guilty of any act of negligence in that

(1) Plaintiff was or should have been aware of the dangerous condition whereby he was injured,

(2) Defendant warned plaintiff personally of the danger,

(3) Defendant warned plaintiff's employer of the danger.

Myers v. Gulf Public Service Corp., 15 La. App. 489, 132 So. 416;

Willis v. Snyder, 190 Iowa 248, 180 N. W. 290;

Engle v. Reider, 366 Pa. 411, 77 A. 2d 621;

American District Telegraph Co. v. Kittelson, 179 Fed. 2d 946 (8 Cir., Iowa).

III.

The negligence of plaintiff's employer, Pittsburgh Piping & Equipment Company, was the sole proximate cause of the accident and the injuries to plaintiff, and defendant cannot be held accountable.

Reilly v. Chicago, N. W. Ry. Co., 122 Iowa 525, 98 N. W. 464.

IV.

Plaintiff cannot recover because he assumed the risk inherent in performing work in a dangerous area.

Gowing v. Henry Field Co., 225 Iowa 729, 281 N. W. 281.

ARGUMENT.

I.

The Duty of the Defendant to Use Due Care for the Safety of Plaintiff Requires Only That It Do Nothing to Render Its Premises Unsafe and That It Warn Plaintiff of Any Dangers Known to It, But Unknown to Him.

The plaintiff undertook his duties on property owned by the defendant, Clinton Foods, Inc., as an employee of Pittsburgh, an independent contractor (Record, p. 33), which exercised full supervision over him (Record, pp. 33 and 34). The defendant did not employ him nor did it exercise any control over his work. Therefore, under the relationship, no duty was imposed upon the defendant to furnish a safe place to work in the sense that a master has the duty to do so.

It was, however, incumbent upon defendant to do nothing which would **create** an unsafe condition during the time that plaintiff was working on its property.

It is undisputed that at no time, during the period while plaintiff was at work on defendant's property, was the power in the transformer area turned off. It was the custom to have the emergency transformers activated at all times except when work had to be done on them (Record, p. 14). At the time in question the plant was running seven days a week. However, even at times when the plant was shut down over the week-end, the transformers were connected in (Record, p. 13).

Therefore, defendant did nothing to turn a "safe" work area into an unsafe one. The danger in the area was ever present and was not created during the progress of the work.

This being the case, the negligence, if any, of defendant must have been negligence of omission—the failure to discharge a duty imposed upon it by the law of Iowa. The sole affirmative duty of the defendant, under the relationship which existed, was to warn the plaintiff of latent dangers of which it was aware.

The Iowa Rule is stated in **Gowing v. Henry Field Co.**, 225 Iowa 729, 281 N. W. 281.

In that case plaintiff was a plumber and was engaged as an independent contractor to install a steam pipe in the gutters of one of the defendant's buildings. In the course of the installation he had attempted to descend a fire escape while carrying two pipe wrenches and a piece of pipe, and while doing so had fallen to the ground and been severely injured. Plaintiff and three others had previously used this fire escape in carrying a long piece of pipe to the ground and **had done so at the suggestion of one Snodgrass, an employee of defendant,** who had been instructed to apprise plaintiff of where the pipe should be placed and, together with two other employees of defendant, to help in the installation.

Plaintiff's action was based upon negligence of the defendant in offering an infirm fire escape for plaintiff's use and in failing to warn him of the danger when it knew or should have known of it.

Defendant averred that plaintiff was an independent contractor and its duty did not extend to furnishing him a safe place to work; that plaintiff had failed to exercise reasonable care; that the defect, if any, was readily apparent and, therefore, plaintiff assumed the risk incident to using the fire escape, and that, if the defect were not readily apparent, it was equally unknown to defendant.

The Supreme Court of Iowa, in discussing the obligations inherent under the relationship established, said:

"The only duty owing by the defendant to the plaintiff as an independent contractor was that of exercising reasonable care to promote his safety. Plaintiff was an invitee and it was defendant's duty to warn him of any danger in and about the premises which he knew of or in the exercise of ordinary care ought to have known of and of which plaintiff was not aware or which in the exercise of ordinary care on his part would not have been discovered. Steel v. Grahl-Peterson Co., 135 Iowa 418, 109 N. W. 882.

"Defendant was not responsible to plaintiff as an independent contractor for injuries from defects or dangers which the contractor knew or ought to have known of, 'but if the defect or danger is hidden and known to the owner, and neither known to the contractor, nor such as he ought to know, it is the duty of the owner to warn the contractor, and if he does not do this, he is liable for resultant injury.' Douglass v. Peck & Lines Co., 89 Conn. 622, 95 A. 22; 44 A. L. R. 894, note: Arizona Binghampton Copper Co. v. Dickson, Adm'r, etc., 22 Ariz. 163, 195 P. 538; 44 A. L. R. 881."

In discussing the rule that no warning is necessary to one who is aware of the danger involved, the Court quoted with approval from **Stein v. Battenfield Oil & Grease Co.**, 327 Mo. 804, 39 S. W. 2d 345, as follows:

"The deceased, in going to the respondent's plant as an independent contractor to do work, was an invitee. The respondent would be liable for injury to him occasioned by any unsafe condition of the premises encountered in the work, which was known to it but unknown to him; but was not liable for injuries resulting from conditions obviously dangerous and known by the deceased to be so. As to these, he was guilty of contributory negligence, or, more accurately, assumed the risk. He knew the belt was unguarded,

he knew the motor was running 'at great speed and with terrific force,' as the petition says and yet he took a posit on 3 feet above the floor with one foot upon the rounded flange of the motor and the other on a cross-piece against the wall about 3 feet away, with his legs astride the rapidly moving belt and his body twisted, while he worked. He was not a servant ordered by the respondent to go where he did; he was an expert following his own advices. He knew the conditions he would have to cope with. Under the authorities the respondent cannot be charged with liability for the unfortunate result.' Main v. Lehman, 294 Mo. 579, 242 S. W. 91; Vogt v. Wurmb, 318 Mo. 471, 300 S. W. 278; Goetz v. Hydfaulic Press Brick Co., 320 Mo. 586, 9 S. W. 2d 607; 60 A. L. R. 1064; Cash v. Sonken-Calamba Co., 322 Mo. 349, 17 S. W. 2d 927."

The status existing between plaintiff and defendant is similar to that described in this quotation. Defendant had no power to order, nor did it order, plaintiff to go where he did. Defendant had no control over the manner in which Pittsburgh performed the contract, merely the right to pass upon the result. While plaintiff was a servant, he was not the servant of the defendant, but of Pittsburgh, which had contracted to do a job which, of necessity, would bring its workers in proximity to the transformers. Defendant had no control over the manner in which Pittsburgh performed the contract, but merely the right to pass upon the result. Under such circumstances, the obligation to furnish a safe place to work was not imposed upon Clinton Foods.

By the nature of the relationship, the defendant's **sole** duty was to warn its invitees, **if necessary.** Defendant's obligation was not such as it would owe to one of its own employees, and it was not bound to furnish a safe place to work. If it were otherwise, no one could safely contract

to have work done in a place known to be dangerous, even if the purpose of the work was to correct that very condition.

In **American District Telegraph Co. v. Kettelson**, 179 F. 2d 946, this court cited **Gowing v. Henry Field Co.**, supra, as establishing the Iowa law as to the duty owed an independent contractor and quoted the first paragraph of the quotation hereinbefore set out: It did so in approving an instruction which read in part:

> "You are instructed that if you find that the condition of the skylight in question did present a hidden defect, danger, or pitfall to persons using the roof, and Armour & Company knew or in the exercise of reasonable care should have known of such condition and should have reasonably expected that the defendant's employees would use said roof in the performance of their duties then the failure to warn the defendant or its employees of such hidden defect, danger or pitfall constituted negligence. . . ."

The Supreme Court of Iowa has never been called upon to apply the doctrine announced in **Gowing v. Henry Field Co.** to a case involving the ownership and maintenance of electric equipment by one who is not primarily engaged in the business of producing and dispensing electricity as a public utility. However, the case was cited with approval by the Supreme Court of North Carolina in a case which was quite similar in many of its facts to the one at bar.

In **Deaton v. Board of Trustees of Elon College**, 226 N. C. 433, 38 S. E. 2d 561, the defendant was the owner of a local electric light system. A portion of it had fallen into a dangerous and defective condition and plaintiff's decedent, together with two others, was engaged to make the necessary repairs. This necessitated replacing six old poles with new poles and transferring five wires from the old poles to the new.

Three of the wires were high-tension, carrying 2300 volts and two carried 110 volts each. The deceased and his associates knew that three of the wires were high tension and two were light circuit wires, but did not know which were high tension and which were low voltage. Defendant failed to advise or warn them in this respect.

The contractors decided to set the six new poles before starting to transfer the wires. However, it became necessary to detach the wires hung on the fourth and fifth poles in order to set the fifth new pole properly. One of the men untied and dropped the wire on the fifth pole and the deceased caught hold of it to pull it out of the way. He received a severe electric shock from which he died.

Decedent's administratrix brought suit against the Board of Trustees. At the conclusion of all of the evidence the defendant moved to dismiss as in the case of non-suit. The motion was allowed and judgment and non-suit was entered and appealed from.

The Court did not specifically decide whether, in view of decedent's personal knowledge, there was negligence in failure to warn him. It affirmed the lower court's ruling on the motion because the decedent's failure to exercise ordinary care for his own safety was such as to induce the conclusion that his own lack of due care proximately caused or contributed to his injury and death.

However, in discussing the duty owed by the defendant, the court spoke as follows:

> "Many of the authorities cited both by plaintiff and defendant involve the master-servant relationship which imposes upon the master duties in excess of those which an owner-contractee owes to an independent contractor. So then, while helpful, they are not directly in point.
>
> "Ordinarily an employer of an independent contractor may not be held liable for injuries which have

been sustained in the performance of the contract by the contractor himself. 35 Am. Jur. 588; Arizona Binghampton Copper Co. v. Dickson, 22 Ariz. 163, 195 P. 538, 44 A. L. R. 881; Roddy v. Missouri Pac. R. Co., 104 Mo. 234, 15 S. W. 2d 1112, 72 L. R. A. 746, 24 Am. St. Rep. 333; Annotation, 44 A. L. R. 891.

"Since independent contractors are not servants of the contractee a contractee, in the absence of some special circumstance or circumstances imposing liability, is not liable as master for injuries sustained by an independent contractor, the contractee's liability, if any, being the same as that imposed on him with respect to third persons generally. 39 C. J. 1349, Sec. 1567.

"Although there are decisions contra, it is generally held that one who is having work done on his premises by an independent contractor is under the obligation to exercise ordinary care to furnish reasonable protection against the consequences of hidden dangers known, or which ought to be known, to the proprietor and not to the contractor or his servants.

"The rule applies only to latent dangers which the contractor or his servants could not reasonably have discovered and of which the owner knew or should have known. 39 C. J. 1348, Section 1566; 2 Shearman & Redfield, Negligence 689 (Rev. Ed.); 3 Cooley, Torts, 4th Ed. 426.

"The owner is not responsible to an independent contractor for injuries from defect or dangers of which the contractor knew or should have known, 'but if the defect or danger is hidden and known to the owner, and neither known to the contractor, nor such as he ought to know, it is the duty of the owner to warn the contractor, and he does not do this, he is liable for resultant injury.' Douglass v. Peck & L. Co., 89 Conn. 662, 95 A. 22, 25; Arizona Binghampton Copper Co. v. Dickson, supra; Gowing v. Henry Field Co., 225 Iowa 729, 281 N. W. 281; Annotation, 44 A. L. R. 894; Steele

v. Grahl-Peterson Co., 135 Iowa 418, 109 N. W. 882. See also State Highway & Public Works Comm. v. Diamond Steamship Transportation Corp., N. C., 38 S. E. 2d 214.

"'It has been repeatedly held that where one knowingly places himself in a place of danger which he might easily have avoided he assumes all the risks incident thereto.' Dreier v. McDermott, 157 Iowa 726, 141 N. W. 315, 319, 50 L. R. A. N. S., 566; Gowing v. Henry Field Co., supra. And the owner-contractee is not liable for injuries resulting from conditions obviously dangerous and known by the contractor to be so. Highway Comm. v. Transportation Corp., supra; Gowing v. Henry Field Co., supra."

A discussion of the liability of a contractee with respect to injuries resulting from the dangerous condition of his premises appears at 44 A. L. R. 982. It found the doctrine, as announced by numerous decisions, to be:

"Where the premises on which the stipulated work is executed remain under the control of the principal employer while the contract in is the course of performance, a servant of the contractor is in the position of an invitee, and as such entitled to recover for any injury which he may sustain by reason of the abnormally dangerous condition of the premises or plan thereon, if the evidence shows that the principal employer was, **and the servant was not, chargeable with knowledge, actual or constructive,** of the existence of that condition." (Emphasis supplied.)

It is clear that if the plaintiff was aware, or should have been aware, of the peril existing in the transformer area, no affirmative duty was ever imposed upon the defendant. If such was not the case, then an affirmative duty was imposed, but it was limited to warning the plaintiff of the hazard.

II.

The Defendant Was Not Guilty of Any Act of Negligence in That (1) Plaintiff Was or Should Have Been Aware of the Dangerous Condition Whereby He Was Injured, (2) Defendant Warned Plaintiff Personally of the Danger, (3) Defendant Warned Plaintiff's Employer of the Danger.

Under the law as stated in Point I, plaintiff cannot recover if he was aware of the danger. If he, through his own experience and perception, should have been aware of the peril, there was no duty to warn him of it.

The evidence discloses that Mr. Youngs' experience was such as to make him aware of the danger which existed in the area in which he was working at the time of his injury.

He had been a pipe fitter for about seventeen years, part of the time as maintenance man in various factories and part of the time on construction work (Record, p. 27). He had, in prior employment, worked around electric power plants and had been a foreman for Midwest Pipe & Supply Company which had engaged in a $4,000,000 expansion program at the Riverside Power Plant owned by Iowa-Illinois Gas & Electric Company (Record, p. 31). While not an electrician, he testified that he had the familiarity with transformers, generators and electrical equipment that normally arises from working around them and that he knew that transformers are normally dangerous (Record, p. 31). He further testified that prior to the time the crew went into the enclosed area to lay the pipe through it, he and other crew members had discussed the advisability of doing so (Record, p. 29).

He and the other crew members had worked in the enclosed transformer area for a total of about five days prior to the date of the accident (Record, p. 28). He testified

that it would be a safe assumption on the part of anyone entering an area of this nature, that some of the transformers might be energized, and that he knew that the first bank of transformers which the crew had run pipe past was energized (Record, p. 31). He testified that he did not assume that emergency transformers would be energized. However, he stated that he did not know whether the transformers in question were emergency or full time (Record, p. 31), although he stated that the crew had general information, from an unknown source, that the transformer on which the plank was laid was emergency (Record, p. 32).

He observed several metal signs in the general area saying "Danger, 13,000" (Record, p. 32). He first testified that he did not consider 13,000 volts excessively high but later stated that in his opinion that it is impossible or nearly impossible, to insulate high voltage lines, such as 13,200 volts (Record, p. 32).

In the light of plaintiff's experience, the danger, which might have been "latent" to one wholly devoid of knowledge of the characteristics of electricity, was "patent" to him. He recognized the transformers as such and was fully aware of their dangerous propensities. His attitude in assuming that emergency transformers are not energized is in direct contrast to that of the foreman, Mr. Morgan, who thought the whole area was energized "because usually where you find a transformer bank, there is juice there some place unless somebody tells you different" (Record, p. 20).

It is submitted that his testimony as to having observed the signs is significant. Whether the existence of the signs indicates inherent knowledge on his part, or that the company did warn him by posting them, the fact remains that he could not have been unaware of the existence of danger in the area and, in view of his admitted knowledge

of the danger of transformers and things electrical, defendant contends that, as a matter of law, he was aware of the danger. That being the case, it never became incumbent upon the defendant to warn him of the danger.

Nevertheless, the record discloses that he was warned.

Mr. Shannon, the defendant's mechanical engineer, testified that he had warned the men repeatedly (Record, p. 10). He stated that, in a voice loud enough for the workmen to hear, he said in substance "Watch out for those transformers. They are hot, and they will bite" (Record, p. 11).

Plaintiff's foreman, Mr. Morgan, testified that he had been warned that "It was all hot" (Record, p. 18), and that Shorty Stapleton, defendant's electrical engineer, was the person who had given him the warning (Record, p. 20). He further testified that he relayed, to the members of the crew, Mr. Stapleton's warning that the area was hot, and that he believed they all understood the fact (Record, p. 21). He believed that he had warned Mr. Youngs along with the rest of the crew (Record, p. 21) and testified that "Mr. Youngs was in the group when I related the warning that everything in this area was hot and I think that he understood" (Record, p. 22).

Norman Owen, a member of the crew, testified, "I definitely recall Mr. Morgan saying to be careful" (Record, p. 27).

Another crew member, Robert L. Sullivan, testified that instructions were received from either Mr. Morgan or Mr. Owen that the whole place was hot and that he thought the crew was present (Record, p. 35). He recalled testifying upon a prior examination that those present at the time of the warning were "the fellows that was working with me", and that "Johnson and Owen and Bud and Morgan" were working with him. He identified "Bud"

to whom he had referred, in his prior testimony as Mr. Youngs (Record, p. 36).

Roy J. Stapleton, defendant's electrical foreman, testified that he knew Mr. Young by sight and that prior to the accident, he talked to four of the crew, including Mr. Youngs, about conditions in the transformer area (Record, p. 39). He testified that he had issued the warning to all four but that Mr. Morgan and Mr. Youngs were those closest to him and he felt that he was talking primarily to them (Record, p. 39), and that one of the Pittsburgh crew members acknowledged understanding of the warning (Record, p. 39).

Mr. Youngs testified that he had been warned of an exposed bus bar (Record, p. 29), but denied having been warned that all of the equipment was hot (Record, p. 31). He did not disbelieve Mr. Morgan's testimony that he relayed the warning to the members of the crew but doubted that Morgan knew who was present when he issued the warning. He denied ever having had any conversation with any of Clinton's personnel about any hazards and stated that he had seen Mr. Shannon only twice in five weeks on the job, and then in areas other than the transformer area (Record, p. 30).

Despite plaintiff's denial that he ever received any warning, defendant insists that he did, personally, receive a warning as a matter of law. He received a warning entirely sufficient in the light of his experience. Having admittedly been told of the "hot" bus bar, knowing as he did the dangerous characteristics of transformers, and having observed the signs, he "knew or should have known" of the danger and is precluded from recovery under the doctrine of **Gowing v. Henry Field Co.**

The Court of Appeals of Louisiana, Second Circuit, supported this view in **Myers v. Gulf Public Service Corp.**, 15 La. App. 489, 132 So. 416.

In that case the facts, as alleged by plaintiff, were as follows:

Upon the invitation of the defendant, the senior class of a high school of which decedent was a member, visited the ice plant of defendant for the purpose of studying the processes used in the manufacture of artificial ice. The children were led and directed across and over a large tank or collection of small tanks filled with water, out of which blocks of ice were manufactured. Overhead were wires which conveyed electricity to a device which was used to lift blocks out of the tank and convey them to other parts of the plant. In walking along the top of the water tanks which were wet and slippery, the decedent fell and, in trying to save himself from falling, reached up and caught the light copper wire and was electrocuted.

The plaintiff alleged that the decedent was not guilty of contributory negligence, that his death was due to the gross carelessness and negligence of the defendant and that the proximate cause of the death was the failure of the defendant, its agents or employees to warn the decedent of the danger from the exposed or live wire. It was also alleged that the current should have been turned off while the children were in the room, particularly in view of the fact that the plant was not in operation during the visit of the children. Judgment in favor of the plaintiff was appealed from.

The case is distinguishable from the one at bar in that the court held that the members of the class were bare licensees because they were there for their own benefit and not in any way for the benefit of the defendant. However, although the court cited authority for the proposition that, as bare licensees, the students were not even entitled to warning, it decided the case on the question of whether they were warned.

The court said:

"* * * This live wire was not hidden. It was overhead six feet and three inches above the level of the floor. It was in plain view of everyone and out of ordinary reach. The decedent was a young man practically grown. He was possessed of at least ordinary intelligence. He knew, or should have known, that this ice plant was operated by electricity. This was a matter of common knowledge. As a 'bare licensee' he was required under the law to take these premises as he found them. * * * He should have observed this wire without having it called especially to his attention and having observed it, he should have instantly known the danger of touching it. He evidently knew its danger without being warned. It is more likely that he touched the wire and grasped it involuntarily as one of the girl students testified she started to do, and was prevented by one of her classmates. It would appear, therefore, that the defendant's employee did not lead decedent upon a hidden peril."

The court found that six witnesses for the defense testified that warning had been given the class as well as three of the nine witnesses for the plaintiff. As to this the court said:

"* * * Whether these warnings reached absolutely every student, and particularly the decedent, we are unable to determine. But it is most likely that several did not hear it, as at least six witnesses testified they did not. But it is certain that every student could have received these warnings if they had been attending to the leadership of the employee. It must be taken into consideration that these were high school seniors. They were supposed to possess a high degree of intelligence and everyone of them should have

known better than to grasp any kind of wire in this building. Furthermore, it must be remembered that these students came to this ice factory under the care and direction of the teacher of the class, and the defendant's employee had a right to suppose that they would remain under his guidance and direction during the entire visit.

"We therefore conclude that the employee of the defendant did not knowingly lead the decedent upon a hidden peril and that he did not wilfully cause him harm. It appears further that the employee discharged his full duty to this class in issuing the warnings which he undoubtedly did. The failure of the decedent either to heed these warnings if heard, or, if not, to hear them or any of them, is not to be charged to the defendant. It was a deplorable tragedy, but because it was does not cast blame upon the defendant."

Defendant contends that the testimony given by Mr. Youngs indicates a level of general intelligence at least as high as that attributable to a high school senior, and that his knowledge of things electrical derived from previous experience, is far beyond that of an ordinary high school senior or an average, well educated adult.

Three witnesses testified to the fact that plaintiff was present when warnings were issued and, to paraphrase the language of the Louisiana Court, "it is certain that every crew member could have received the warnings"; "the failure of the plaintiff either to heed these warnings if heard, or, if not, to hear them or any of them, is not to be charged to defendant" and "these workmen came to this plant under the care and direction of the alter-ego of their employer, and the defendant had a right to suppose that they would so remain during their presence on its property."

Under the circumstances, plaintiff was **personally** warned of the danger, orally.

In addition, the evidence conclusively shows the existence of warning signs in the area.

Plaintiff testified that there were several metal signs in the area saying "Danger—13,000" and that they were placed on the fence or telephone pole (Record, p. 32).

The foreman, Edward G. Morgan, testified that he saw one sign indicating 13,000 volts and that there could have been others (Record, p. 21).

Plaintiff's fellow worker, Norman T. Owen, testified to the existence of signs on the gate or fence fully enclosing all of the transformers, saying "Danger—13,200 volts" (Record, p. 27).

Another crew member, Robert L. Sullivan, recalled signs posted in the general area which said "Danger" and recalled the voltage indication as 13,000 (Record, p. 36).

Cecil W. Shannon testified that there were signs indicating 13,000 volts and to be careful. He testified that there was such a sign on the gate leading into the enclosure from the river side, another on the wooden pole at the side of the ditch and also recalled one on the emergency transformer base (Record, p. 13).

Plaintiff's Exhibit 4 shows a sign on the wooden pole stating "Danger—13,200 volts," referred to by Mr. Youngs and Mr. Shannon in their testimony.

Defendant contends that the existence of these signs, placed at the entrance to the transformer area, on the pole immediately alongside the ditch where plaintiff was and had been working, and on the base of the emergency transformer, constituted a warning too clear to be ignored. This

warning was to plaintiff **personally** inasmuch as he not only could but did observe the signs.

Thus, irrespective of oral warnings, the signs warned plaintiff of the presence of 13,200 volts of electricity, a voltage which plaintiff knew to be too high to be insulated against.

Therefore, the jury could not have found the plaintiff was not warned, and, under the doctrine announced in **Gowing v. Henry Field Co.**, supra, that the sole duty was to warn, defendant's Motion for Directed Verdict should have been sustained.

Even should this court hold that the jury might properly have found that plaintiff had not been apprised, either of his own knowledge or by the existence of warning signs, of the peril involved, the defendant cannot be held accountable, because it unquestionably informed plaintiff's superior and thereby discharged its duty to warn.

Cecil W. Shannon testified, "I told the foreman of the hazards surrounding these transformers, repeatedly" (Record, p. 11), and that the foreman he warned was Mr. Morgan. He further testified, "Every day when they were working in that area I was there to see how the job was progressing, and at all times I went there I stressed the fact that they must be careful of the transformers because they were hot" (Record, p. 13).

Herman C. Heinsen, defendant's Superintendent of Power, testified that prior to the accident he advised Mr. Morgan to be careful in that transformer area and that this equipment was energized (Record, p. 38).

Roy J. Stapleton testified to having warned Mr. Morgan, as well as Mr. Youngs, prior to the accident (Record, p. 39).

Mr. Morgan acknowledged having received warning that "It was all hot" (Record, p. 18) and that this warning came from Shorty Stapleton (Record, p. 20). He also testified, "I personally knew that these transformers were hot" (Record, p. 20). In addition, he recalled having testified in a prior deposition that Mr. Stapleton said that everything in there was hot—they were all hot, as well as that Mr. Herman Heinsen had told him the transformers were hot (Record, p. 21). In that deposition he testified that Heinsen was referring to the whole bank—all of it and had said, "All that stuff is hot in there" (Record, p. 21).

He testified that no particular reference was made to the transformer banks other than that it was hot (Record, p. 18), and recalled having testified in a prior deposition that he told the men that the **wires** were hot and the **transformers** were hot (Record, p. 21). It is clear that Mr. Morgan had been informed of the fact that the entire area was hot, that the transformers specifically were hot and, had either been warned or knew of his own knowledge, that the wires were hot.

In addition, Mr. Guy Muter, who was identified by Mr. Youngs as the Superintendent of Pittsburgh who had been sent by it to take care of the job (Record, p. 32), had been warned of the danger.

Christian S. Hartman, defendant's electrical engineer, testified that during Mr. Shannon's vacation he conferred with Mr. Muter on several occasions, all preceding the accident. He warned him of the danger and the necessity of precaution (Record, p. 37).

It is clear that plaintiff's two superiors, Mr. Muter, who had responsibility for the entire operation, and Mr. Morgan, who was plaintiff's immediate superior, were fully apprised of the facts. Defendant contends that whether

or not this knowledge was conveyed to plaintiff, the defendant had discharged its duty to warn.

To hold that the duty to warn, imposed upon a property owner by the holding in Gowing v. Henry Field Co. extends to notifying each individual employee of the contractor, would be unreasonable. In many instances, one who engages the services of a contractor never comes in any contact with the contractor's employees. In this instance there was some contact, but even here, the record discloses that various employees of Pittsburgh were engaged, and came on the job, at different times. In addition, the employees were under the exclusive control of Pittsburgh and the right of any representative of Clinton Foods to approach them is questionable. If a property owner were to suggest that the employees of his contractor cease work while he talked to them, the contractor might well consider it an unwarranted invasion of his right of control.

Defendant has found no Iowa decisions upon this point. However, an analogous situation is presented where an injured third party, an invitee of a lessee, attempts to recover of the lessor for failure to warn of defects on the leased premises. The Supreme Court of Iowa has consistently held that a lessor, fully aware of latent danger existing in the premises involved, has discharged his liability, even toward an invitee of the lessee, by warning the lessee—the person with whom he is in privity.

In **Willis v. Snyder,** 190 Iowa 248, 180 N. W. 290, the Iowa Supreme Court was faced with the following situation. The facts appear from the quotation:

> "Plaintiff is the mother-in-law of Ralph Vanderpool, who, she alleges in her petition, on April 1, 1918, orally leased the dwelling house referred to from the defendant, coupled with an agreement as a part

thereof to keep the premises in repair and suitable for use; that the steps leading from the front porch to the walk or ground below became defective and in a dangerous condition; that on or about April 6th the lessee notified the lessor thereof and that he agreed to immediately repair the same, but that he negligently failed to do so; that on the evening of April 26th, while on said steps, they gave way, causing her to fall, with the result that she was severely and painfully injured. The petition is in two counts. In the first negligence based upon the alleged failure of the lessor to, within a reasonable time after notice of the defective and dangerous condition of the steps, cause the same to be repaired is alleged, and in the second it is charged that the condition of the steps was such as to amount to a nuisance.

* * * * * * *

"In the absence of an express agreement to repair, the liability of the lessor is limited to damages caused by the defective condition of the premises, **where the defect was known to the lessor at the time the lease was entered into, which he concealed from the tenant, or failed to call to his attention.** * * * Independent of the alleged agreement (to repair) defendant owed no duty to his lessee to make repairs, except as above pointed out. His obligation, whatever it was, was contractual and did not arise out of a duty imposed by law.

"No greater obligation was imposed upon the lessor by express notice of the alleged defective condition of the steps than that created by the agreement to make repairs, except, perhaps, the duty of the lessor to make repairs at all would make such agreement commence only after notice to him that same was necessary. An implied duty, under a contract by the lessor, to keep the premises in repair, would no doubt rest

upon the tenant to give notice of defects to the lessor. As a cause of action in tort cannot be predicated upon a breach by the lessor of an agreement to make repairs, and as the liability of the lessor for damages suffered by the lessee on account of the defective condition of the premises arises **only when the defect existed at the time the lease was entered into and was known to the lessor and concealed by him from the lessee,** no liability is shown. Except where a duty is imposed by law upon the lessor to make repairs, no higher or greater duty than that derived from the contract could be imposed upon the lessor by notice of the defects." (Emphasis supplied.)

The Supreme Court of Pennsylvania decided the question presented here in **Engle v. Reider,** 366 Pa. 411, 77 A. 2d 621.

In that case the plaintiff sued for the death of her husband which she alleged to have been caused by the presence of carbon monoxide gas from a hot water heater in defendant's building located in an area in which decedent had been working. The suit named the property owners and the husband's employer as defendants and the plaintiff recovered a verdict against the employer. Judgment was rendered for the defendant property owners and a motion for a new trial was denied, which ruling was appealed.

The court found that the hot water heater in question was in a small closet on the second floor of defendant's building and, although provided with an opening for the purpose, it had not been fitted with a vent to carry such fumes. Rather, they were discharged through a hole in the ceiling into an attic which the court characterized as "a reservoir for the accumulation of carbon monoxide gases." Defendants had been advised by the contractor who installed the heater that a vent should be attached

and he recommended a tinner for the job but they took no steps to correct the condition. At different times thereafter their attention was called to the danger and they were urged to correct it but nothing was done. Decedent was an employee of a contractor who had been engaged to install a furnace near the heater. It was necessary to run a wire through the area in which the gas had accumulated and while doing so, decedent was overcome and died.

The contractor testified that he had been on the premises on several occasions and noticed the lack of a vent and that he was aware of the danger and had discussed the matter with one of the defendants. He had informed a co-employee, Smith, but had not warned decedent.

The following quotation constitutes what the Supreme Court set out of an instruction which it approved, and indicates the reasons therefor:

> "The learned trial judge charged the jury, that, while he would leave it to them to decide, it seemed to be undisputed that the contractor Routman, well knew that there was a dangerous situation there caused by the failure to have a vent pipe that would carry the carbon monoxide fumes into the open air, and had warned his employee Smith accordingly. The jury was then instructed that 'The extent of the duty of the owner of the building who employs an independent contractor to the latter's employees (that is, Routman's employee, Engle) with respect to known or discoverable dangerous conditions existing on the premises where the work is to be done, is to warn the contractor of their existence; **he is not required to warn every subcontractor and laborer who comes on the premises.** In this case, * * * **the Reiders had no obligation to warn Engle, an employee of Routman.** His full duty was performed with regard to this dan-

gerous condition when he warned the contractor Routman. If you find that he did warn the contractor Routman; or, if you find that Routman did not need to be warned because of his superior knowledge of the danger of unvented flues, or because of his having visited the premises five or six times he saw, or ought to have seen this obvious danger and realize it—and he says he did—then Reider's full duty to those business visitors, Routman and Engle, was to notify Routman, or be sure that Routman knew of the existence of this condition which was dangerous; and if he had done that he did not need to go farther; **he did not need to go as far as to notify Engle.**' The court further charged the jury that 'the burden is affirmatively on the plaintiff (Mrs. Engle in this case) to prove the employer's (owner's) (Reider's) failure to notify the contractor of the existing dangerous condition. There was no attempt made to show that. As a matter of fact, on cross-examination of Routman it was developed that Routman did know of the existence of this dangerous situation, and that he did nothing about it, except, as he says, that he warned Smith not to, under any circumstances, go up into that cubbyhole in the roof without first turning off the gas for a sufficient length of time to have the carbon monoxide gas dissipated. He doesn't say that he notified Engle; that wasn't developed. The burden is upon the plaintiff to show affirmatively that the Reiders did not notify the contractor.' (Emphasis supplied.)

"These instructions were in complete accord with the law of Pennsylvania on the subject thus discussed. In Newingham v. J. C. Blair Co., 232 Pa. 511, 81 A. 556, the following quotation from White's Supplement to Thompson on Negligence, sec. 979:

'It is the rule that the owner of property owes to an independent contractor **and his servants a**:

> **work thereon** the duty of exercising reasonable care to have the premises in a safe condition for the work, unless the defects responsible for the injury **were known to the contractor.**' (Emphasis by the court.)

was commented upon as enunciating a 'sound general rule.' Authority to the same effect is to be found in Nettis v. General Tire Co. of Philadelphia, Inc., 317 Pa. 204, 177 A. 39. There then following the decision of this court in Valles v. Peoples-Pittsburgh Trust Co. 339 Pa. 33, 13 A. 2d 19, where the subject of the liability of a property owner to the employees of a contractor called to work upon the premises to warn such employees against latent dangers was comprehensively discussed in an opinion by Mr. Justice Linn and it was held that the extent of the duty of the owner of a building under such circumstances was to warn the contractor of the existence of dangerous conditions, but that **he was not required to warn every sub-contractor and laborer who came on the premises,** —that his responsibility to an independent contractor's employees while performing the contract on his premises was not the same as his responsibility to his own employees; furthermore, that it was a necessary and essential part of the plaintiff's case to prove that the property-owner failed to notify or warn the contractor and that the latter did not have knowledge thereof. In the present case plaintiff made no attempt to prove that the contractor was uninformed as to the danger; on the contrary, the contractor himself testified that he was fully aware of it and had discussed it with defendants themselves. If, as the court instructed the jury, they believed Routman's testimony to that effect, their verdict in favor of defendants necessarily followed from the law laid down in the Valles case." (Emphasis supplied.)

One justice dissented and expressed his feeling that the majority opinion had extended the rule of Valles v. Peoples Pittsburgh Trust Company beyond its logical application. However, he did not attack the rule laid down in that case but pointed out that in that case the ammonia pipes involved had been properly installed, whereas in the case at issue the

> "**lack of a vent** for the gas water heater • • • **was neither a proper nor an essential type of installation;** • • • Yet, he knowingly persisted in maintaining in his building a veritable lethal chamber which caused exactly what he must have known it was certain at some time to cause, namely, the death of a human being.
>
> "• • • The instruction gave Reider far more than he was entitled to under the evidence which warranted a jury's finding that his actions in the premises constituted **reckless and wanton negligence,** nothing less. And, just as contributory negligence is no defense to an action for another's **reckless** and **wanton** misconduct (citing cases), by like token, one does not exculpate himself from liability for his **reckless and wanton negligence** by warning another of it." (Emphasis supplied by dissenting justice.)

It is interesting to note that in **American District Telegraph Co. v. Kittelson,** cited in Point I hereof, Judge Graven apparently construed the Iowa Law as we contend it to be, in instructing the jury as to Armour & Co.'s negligence that "the failure to warn the defendant **or its employees** of such hidden defect, danger or pitfall constituted negligence."

The defendant feels that these cases support its contention that its duty was to warn only Pittsburgh, with which it was in privity, and did not extend to warning the individual employees of Pittsburgh, with whom it was not.

Therefore, the duty to warn established in Gowing v. Henry Field Co., was discharged by the warnings to Mr. Muter and Mr. Morgan.

III.

The Negligence of Plaintiff's Employer, Pittsburgh Piping & Equipment Company, Was the Sole Proximate Cause of the Accident and the Injuries to Plaintiff, and Defendant Cannot Be Held Accountable.

Not only was Pittsburgh an independent contractor, in undertaking this work (Record, p. 33), but it had undertaken to furnish all labor and materials, tools, supervision and methods as outlined in the specifications, and equipment and transportation necessary for proper execution of the work (Record, pp. 33 and 34).

The plaintiff stipulated to the foregoing facts as stated but objected to introduction of them on the ground that the duty to provide safeguards and a safe place to work was non-delegable. Plaintiff also argued in opposing defendant's Motion for Judgment Notwithstanding the Verdict that defendant could not delegate these duties and thus could not relieve itself of the obligation.

This is not a question of whether defendant could delegate duties owed by it. The duty to provide a safe place to work and to provide safeguards never fell upon the defendant. Its duty was as stated in Gowing v. Henry Field Co. and did not include these obligations. As is argued in Point II hereof, its duty to warn was not delegated to Pittsburgh but was **discharged** by warning Pittsburgh.

On the other hand, the duty to provide a safe place to work, and to make or request all changes necessary to make and keep it safe during the progress of the work, was upon Pittsburgh.

In **Reilly v. Chicago & N. W. Ry. Co.**, 122 Iowa 525, 98 N. W. 464, the plaintiff was employed by an independent contractor who had engaged to raise a portion of the road-bed and track of defendant. Dirt containing stones had been piled about 3 feet high alongside the track and had been shoveled beneath the track after it was rased. While plaintiff was working near the track, defendant's train went by at a high rate of speed and its pilot wheel struck a stone which had presumably rolled down from the pile, throwing it against plaintiff and breaking his leg.

Plaintiff conceded that, if the negligence was solely that of his employer, he could not recover, but alleged that the defendant was negligent (1) in allowing the dirt to be placed so close to the track that stones might roll from the dump and become a source of accident or danger from moving trains; (2) in running its train at a recklessly high rate of speed in view of the danger at that point; (3) in failing to order a reduction of speed by its trains at that point; and (4) in not having an overseer or guard of some kind at the place to keep the track clear.

In discussing the respective duties owed plaintiff by the defendant and by his employer, the Court said:

> "But can it be said that there was any neglect of duty owed by defendant to plaintiff in these respects? If plaintiff were a passenger or employee upon the passing train, and by reason of such obstruction or the dangerous proximity of the dump the train had been derailed, resulting in his injury, we can readily conceive of circumstances under which the company might be made liable for the act or omission of the contractor, for one who is personally bound to perform a duty—as, for instance, a master, who is bound to furnish his servant a safe place in which to work; or a common carrier, who is bound to exercise care for the

safe transportation of passengers and freight—cannot relieve himself from the burden of such obligation by any contract he may make for its performance by another person. Shearman & Red. on Neg. (5th Ed.), p. 14. But plaintiff was neither a passenger on defendant's road nor an employee in its service. True, there was a measure of duty from the latter to the former, for the plaintiff, as the employee of the contractor, had a legal right to be where he was, and defendant owed him reasonable care to avoid injuring him by its acts, or by the manner in which its own employees performed their several duties. We do not think, however, that it was under any leal obligation to guard or protect the plaintiff against the consequences of the negligence of his immediate employer. To illustrate: if, by reason of the negligence of the trainmen, a coupling pin lying upon the platform of the car had been hurled through the air, striking the plaintiff (Doyle v. R. R., 77 Iowa 607, 42 N. W. 555, 4 L. R. A. 420), or if the passing train, instead of colliding with a stone left upon the track by the contractor, had struck a sledge or pick carelessly left there by defendant's section crew (Tex. & Pac. R. R. v. Carlin, 111 Fed. 777, 49 C. C. A. 605, 60 L. R. A. 462), a very different question would be presented. There is nothing in the record to indicate that defendant ordered or required the contractor to dump the dirt so near the track as to create danger of this nature. It does appear that the contractor was required and undertook to keep the track clear from obstructions. There is no principle of law which required the company to supervise the contractor in the performance of this duty as a measure of protection to the contractor's servant. So far as appears from the record, the defendant had no power or authority to control the means or methods to be employed by the contractor in doing the

work. It did require certain results—certain things to be done—and had an engineer to see that the work done was of the kind and quality contracted for, but as to the methods of the work and the control of the employees therein the contractor was entirely independent of its dictation. The duty of furnishing plaintiff a safe place to work and exercising care and supervision to maintain such condition of safety rested upon the employer alone, and (unless it be under extraordinary circumstances, which do not here obtain) that obligation cannot be extended to include the party for whom the contractor had undertaken to perform the work. Miller v. R. R., 76 Iowa 655, 39 N. W. 188, 14 Am. St. Rep. 258; Branstrator v. R. R., 108 Iowa 377, 79 N. W. 130; Humpton v. Unterkircher, 97 Iowa 509, 66 N. W. 776; Brown v. McLeish, 71 Iowa 389, 32 N. W. 385."

If the area, into which Pittsburgh contracted to take its employees, was unsafe, and Pittsburgh could not render it safe, Pittsburgh was negligent in contracting to do the job. Pittsburgh not only contracted to do this job and assumed a burden imposed by law to provide a safe place for its employees but specifically agreed by contract to furnish all labor, material and tools and to supervise the execution of the work.

It entered into a contract involving some danger to its men with full awareness of that danger and, it is to be assumed, took that danger into consideration in determining the compensation which it would exact for performing the work.

If the Record discloses that the plaintiff, Mr. Youngs, was not personally warned by Pittsburgh that failure to warn and thus aid in rendering the area safe for its employees, was negligence on the part of Pittsburgh. There

is no question that Mr. Guy Muter who was in charge of the entire project for Pittsburgh had been warned. Neither can it be doubted that Mr. Edward G. Morgan, plaintiff's foreman, had been warned. In addition, Mr. Morgan testified "I personally knew that these transformers were hot" (Record, p. 20). Therefore, if the proximate cause of the injuries suffered by plaintiff is found to be the fact that he was not aware of the danger, it was occasioned by the negligence of his employer which was well aware of the situation and which was under a legal duty to provide a safe area in which he could work.

Christian S. Hartman, defendant's electrical engineer, testified to a conversation with Mr. Guy Muter in which he said, "We offered to provide rubber blankets, or if needed, a protective barricade if he wanted them. He responded that no one had been hurt up to that time. He refused my offer and never after that solicited, from me, similar safeguards" (Record, p. 37). It appears from the record that no one else from Pittsburgh ever solicited any safeguards from any member of Clinton's personnel.

Again, Pittsburgh was negligent in turning down a proffered opportunity to avail itself of safeguards which would have helped it to discharge its legal obligation to provide its employees a safe place to work.

In examination of Cecil W. Shannon, and various other witnesses, the plaintiff questioned at length whether the existence of "shut-off" switches which would have deactivated the transformers was ever revealed to plaintiff or any of his fellow employees. It matters not whether they were informed of the location of the switches. Certainly they were aware that there was a way to shut off the transformers. Else Mr. Youngs could hardly have felt that the emergency transformers were harmless. Yet, nowhere in the record is there any evidence that any member of the

Pittsburgh crew requested that the transformers be shut off. In fact, Mr. Morgan (Record, p. 22) and Mr. Youngs (Record, p. 33) both testified they did not make such a request.

Mr. Shannon testified, in explanation of why the defendant did not disconnect the transformers, that such action would have involved many hazards. His most comprehensive testimony as to these hazards appears in the Record at pages 12 and 13. His testimony gives rise to serious doubt as to the advisability of turning off the emergency transformers in order to render the area innocuous.

Be that as it may, the responsibility did not rest with Clinton to turn off the power, at least in the absence of a request by Pittsburgh that such be done. Clinton's duty did not extend to providing a safe place to work but Pittsburgh's did and it devolved upon Pittsburgh to request that the power be shut off. This it could have done, either at the inception of the contract by refusing to contract to send its men into an area of known danger, or during the progress of the work.

Therefore, if the failure to turn off the power leading to the transformers was the proximate cause of the accident and consequent injury to plaintiff, it was the negligence of his employer, not that of the defendant.

Plaintiff introduced evidence tending to show that the methods utilized by Pittsburgh in endeavoring to position the pipe in the ditch which it had prepared were feasible and proper methods of doing the work. It is doubtless true that in view of the equipment on hand, the use of a chain-fall or hoist, which necessitated the presence of the plank upon which plaintiff was standing at the time of his injury, was proper. However, Mr. Morgan testified, "We

maneuvered the pipe into position by hand. **We usually use a crane but we didn't have any.** Some of it we rolled in, dropped on blocks, and some we drifted in with a chain" (Record, p. 16). There was no evidence that the area was inaccessible or that its characteristics did not permit the use of a crane as was ordinarily the practice. The reason, according to Mr. Morgan, was "We didn't have any."

Certainly Pittsburgh, having the responsibility of providing all materials and tools as well as determining methods of performing the work, is chargeable with negligence in not providing the equipment normally used in work of this kind, which equipment might well have avoided the injury to plaintiff.

It is equally obvious that Clinton, retaining no control of the methods used in doing this work, and having only the right to demand that it be done according to the specifications contained in the plans for the project, was not negligent in this respect.

Therefore, if the methods utilized were improper, and negligence in their use was the proximate cause of the accident and injury to plaintiff, such negligence is chargeable to plaintiff's employer, Pittsburgh, and not to the defendant.

Defendant contends that irrespective of what act might be found to be negligent and to have constituted the proximate cause of the injury to plaintiff, it was an act of either plaintiff or his employer and defendant cannot be charged with responsibility.

(IV eliminated as dealing with a point not now under consideration.)

CONCLUSION.

It is urged that, for the reasons shown in the foregoing Statement of the Case, Authorities and Argument, the trial court erred in submitting the case to the jury, and that the Judgment entered on September 13, 1956, should be reversed.

Respectfully submitted,

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